CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

Nos. 238 and .....

ESTATE OF PAUL LOUGHRIDGE, Deceased,
MARJORIE MEAD LOUGHRIDGE, Executrix,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

COMMISSIONER OF INTERNAL REVENUE,

Respondent,

vs.

ESTATE OF PAUL LOUGHRIDGE, Deceased,
MARJORIE MEAD LOUGHRIDGE, Executrix,

Petitioner.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION

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SUBJECT INDEX

PAGE

PETITION FOR WRIT OF CERTIORARI

Summary Statement of Matter Involved 1

Jurisdictional Statement 3

Question Presented 3

Reasons Relied on for Allowance of Writ of Certiorari 4

Prayer for Writ of Certiorari 5

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI 6

Opinion of Court Below 6

Jurisdiction 6

Statement of the Case 7

Specification of Errors 9

Argument 10

Summary of Argument 10

Point A 11

Point B 14

Conclusion 18

PAGE

Table of Cases Cited.

Estate of Hays, et al. v. Commissioner, 181 F. (2) 169 (1950) 4, 12, 13
Maryland Casualty Co. v. United States, 169 F. (2d) 102 (1948) 4, 10, 18
Popplewell v. Stevenson, 176 F. (2d) 362 (1949) 17

Table of Statutes Cited.

Internal Revenue Code, Sec. 811(d)(2) 2, 3, 4, 9, 14
Internal Revenue Code, Sec. 811(d)(3) 2, 4, 9, 11
Internal Revenue Code, Sec. 812(c).. 2, 8, 10, 14, 15, 17, 18
Internal Revenue Code, Sec. 811(f) 13
Tax Court Rules of Procedure, Rule 7 16
United States Code, Title 28, Section 1254 ..... 3, 7

Other Authorities Cited.

Freeman on Judgments (5th Ed.) Sec. 1350 16
31 American Jurisprudence, Sec. 610 16

Supreme Court of the United States

OCTOBER TERM 1950

Nos. ..... and .....

ESTATE OF PAUL LOUGHRIDGE, Deceased,
MARJORIE MEAD LOUGHRIDGE, Executrix,
Petitioner & Appellant below,

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Respondent & Appellee below.

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Respondent & Appellant below,

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MARJORIE MEAD LOUGHRIDGE, Executrix,
Petitioner & Appellee below.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

TO THE HONORABLE THE SUPREME COURT OF THE UNITED STATES:

Your petitioner respectfully shows that:

Summary Statement of Matter Involved.

This case was initiated by a petition in the Tax Court of the United States offered by your petitioner herein for a redetermination of an estate tax deficiency claimed by the

Commissioner of Internal Revenue (R. 4). After a trial in the Tax Court, a decision was rendered in favor of the respondent, Commissioner of Internal Revenue, and against your petitioner determining that there was a deficiency in estate tax of $62,777.40 (R. 96). The Tax Court also denied the petitioner's contention that there was an overpayment of $50,811.54 (R. 17, R. 96). The Court refused to allow, however, an asserted deficiency of an additional $18,709.45, which the Commissioner had claimed by way of an affirmative allegation in his answer, on the ground that the Commissioner had failed to sustain his burden of proving that he erred in the amount which he allowed petitioner as a deduction for previously taxed property (R. 91-92). The decision to this effect was entered on April 4, 1949. Petitions for review were filed by your petitioner (R. 97) and by the Commissioner of Internal Revenue (R. 101) with the Court of Appeals for the Tenth Circuit which affirmed that portion of the Tax Court's decision which determined a deficiency of $62,777.40 on account of inclusion of the Children's Trust in the decedent's gross estate, and reversed that portion which held that the Commissioner had failed to sustain the burden of proof with respect to the elimination of credit for previously taxed property (R. 351).

The principal questions involved on said appeals were:

1. Does Section 811(d)(2) of the Internal Revenue Code require the inclusion of the so-called Children's Trust in the gross estate of the decedent?

2. Was the decedent's estate entitled to a deduction for previously taxed property under Section 812(c) of the Internal Revenue Code in an amount corresponding to the valuation of the so-called Harmon Trust (the decedent's portion) as established by the Tax Court?

Jurisdictional Statement.

It is contended that the Supreme Court has jurisdiction to review the judgment of the Court below under the provisions of United States Code, Title 28, Section 1254, judgment by the Court of Appeals for the Tenth Circuit having been rendered and entered on May 11, 1950, and its order denying a rehearing having been entered on June 7, 1950, and this petition for a writ of certiorari having been filed on or before August 9, 1950.

Questions Presented.

(1) Were the beneficiaries' interests in the Children's Trust, or the enjoyment thereof, subject to such change through the exercise of a power to alter, amend or revoke on the date of the decedent's death so as to require the application of Section 811(d)(2) of the Internal Revenue Code?

(2) Assuming that the decedent could have removed the Trustee on notice and appointed himself as successor trustee, does Section 811(d)(3) of the Internal Revenue Code support the conclusion that the decedent had the power to alter, amend or rerevoke the Children's Trust on the date of the death?

(3) Where the valuation of a previous estate was determined, in a proceeding in the Tax Court, and a stipulation fixing the tax on the entire estate was entered into was parol evidence to contradict or modify the terms of that stipulation admissible in evidence in a subsequent proceeding to determine whether or not the interest passing to the decedent was property previously taxed within the meaning of Section 812(c) of the Internal Revenue Code?

Reasons Relied on for the Allowance of the Writ.

1. With regard to the first question presented, petitioner maintains that the Court of Appeals for the Tenth Circuit has rendered a decision in conflict with the decision of the Court of Appeals for the Fifth Circuit in *Estate of Hays et al.* v. *Commissioner,* 181 F. (2d) 169 (1950).

2. With regard to the second question presented, petitioner maintains that it is of public importance that an authoritative construction of Section 811(d)(3) of the Internal Revenue Code be had by virtue of its integral relation to Section 811(d)(2) of the Internal Revenue Code, concerning which there is a conflict of decision between the Court of Appeals for the Tenth Circuit and the Court of Appeals for the Fifth Circuit in *Estate of Hays et al.* v. *Commissioner,* 181 F. (2d) 169. Both the Tax Court and the Court of Appeals divided upon this issue.

3. With regard to the third question presented, petitioner maintains that the Court of Appeals has decided an important question of federal law, which has not been, but should be, settled by the Supreme Court since it involves a substantial question in the collection of revenue and the validity of disputed practice in the Tax Court. In this connection, the Court of Appeals for the Tenth Circuit has resolved the issue with respect to the parol evidence rule so as to deny the petitioner's contention that the entire value of the decedent's portion of the Harmon Trust should be deducted from the gross estate and sustained the Commissioner's contention; in so applying the parol evidence rule the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Maryland Casualty Co.* v. *United States,* 169 F. (2d) 102 (1948).

WHEREFORE, your petitioner prays that writ of certiorari issue under the seal of this Court directed to the Court of Appeals for the Tenth Circuit commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Court of Appeals had in the cases numbered and entitled on its docket Nos. 3993 and 3994 (May Term, 1950), *Estate of Paul Loughridge, Deceased, Marjorie Mead Loughridge, Executrix, Petitioner,* v. *Commissioner of Internal Revenue, Respondent; Commissioner of Internal Revenue, Petitioner,* v. *Estate of Paul Loughridge, Deceased, Marjorie Mead Loughridge, Executrix, Respondent,* to the end that these cases may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgments herein of said Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

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Supreme Court of the United States

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Nos. ..... and .....

ESTATE OF PAUL LOUGHRIDGE, Deceased,
MARJORIE MEAD LOUGHRIDGE, Executrix,
Petitioner & Appellant below,

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ESTATE OF PAUL LOUGHRIDGE, Deceased,
MARJORIE MEAD LOUGHRIDGE, Executrix,
Petitioner & Appellee below.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI

Opinion of Court Below.

1. The opinion in the Court of Appeals for the Tenth Circuit is reported in F. (2d) (1950).

Jurisdiction.

1. The date of the entry of the judgment to be reviewed is May 11, 1950, and the date of the entry of the order of the Court denying a rehearing is June 7, 1950.

2. The statutory provision which is believed to sustain the jurisdiction of this Court is U. S. Code, Title 28, Section 1254. The judgment referred to above is a final judgment remanding the cases to the Tax Court for action in conformity therewith.

Statement of the Case.

This has already been largely stated in the preceding petition (pages 1 and 2) which is hereby adopted and made a part of this brief. The issues noted therein arose with respect to the estate of the decedent Paul Loughridge who died testate February 16, 1943, leaving him surviving his widow and four children. At the time of the decedent's death there was in existence a trust (hereinafter referred to as the Children's Trust) created in 1929, modified in November, 1935, to include an afterborn child named Alice, and again modified in December 1935 so as to appoint the United States Trust Company of New York as Trustee in the place and stead of the decedent and his wife Marjorie. At the time of the substitution of such trustee it was provided that "the said Paul Loughridge and Marjorie Mead Loughridge shall have no further power to alter, amend or extend all or any of the terms and conditions of the trust, nor shall the trustee have any such power" (paragraph "Thirteenth" of the amended trust—R. 368). However by paragraph "Second" of the amended trust the trustee was authorized in its discretion when for the best interests of the beneficiaries to terminate in whole or in part the trust applicable to any share created whereupon it was to "be the duty of the trustee to assign, transfer, pay over and deliver, absolutely and in fee simple and free and discharged of all trusts, the whole of such share of the Trust Fund or such part or parts thereof as the case may be, unto the beneficiary of such trust."

It was further provided by paragraph "Twelfth" of the amended Children's Trust that the trustee might resign as such upon the giving of thirty days notice, and that he would resign upon being given thirty days notice requesting such resignation by the decedent. At the time of the decedent's death, the trustee continued in his duties and had given no notice of any intention to resign as such trustee, and no notice requesting such resignation had been given by the decedent. Thus, there rested in the decedent at the time of his death no power to terminate said trust. The Tax Court and the Circuit Court of Appeals in each case by a divided court, held that there was such a power in the decedent at the time of his death and that this constituted the power to alter, amend or revoke the trust. Your petitioner respectfully submits that the Tax Court and the Court of Appeals erred as a matter of law and, furthermore, that such decision of the Court of Appeals for the Tenth Circuit is in conflict with a decision of the Court of Appeals for the Fifth Circuit as noted in the preceding petition.

The second issue arose with respect to Petitioner's claim that property in a so-called "Harmon Trust" which the Tax Court sought to tax as part of the decedent's estate was not so taxable because, exclusive of other reasons, it had been previously taxed within the past five years within the meaning of Section 812(c) of the Internal Revenue Code. In support of such claim your petitioners proved that the valuation of the Harmon Trust was determined in a tax proceeding on the previous estate wherein a stipulation was entered into fixing the extent of the tax liability on the entire estate. To avoid the effect of this stipulation, the Commissioner offered oral evidence which sought to contradict or modify the terms of that stipulation upon which the tax liability upon the entire previous estate was compromised. This testimony was

excluded by the Tax Court on the ground its introduction would have served to vary or contradict the stipulation and consent judgment entered thereupon (R. 73). The Court of Appeals by a divided Court permitted the introduction of this oral evidence which sought to nullify the stipulation. Your petitioners claim that the introduction of such oral evidence was error as a matter of law and violative of public policy in the collection of revenues.

Specification of Errors.

1. The Court of Appeals erred in holding that the decedent at the time of his death had the power to alter, amend or revoke the Children's Trust within the meaning of Section 811(d)(2) of the Internal Revenue Code.

2. Assuming, arguendo, that the decedent could have removed the Trustee on thirty days notice and appointed himself as successor trustee, the Court of Appeals erred in holding that Section 811(d)(3) of the Internal Revenue Code supported the conclusion that the decedent had the power to alter, amend or revoke the Children's Trust on the date of his death.

3. Assuming, arguendo, that the decedent had the capacity to acquire the power to terminate the Children's Trust, the Court of Appeals erred in holding that a bare power of termination, without any additional discretionary power, is sufficient to bring a trust corpus within a grantor's gross estate for Federal Estate Tax purpose where the interests of the beneficiaries of the trust are vested and are essentially estates of inheritance.

4. The Court of Appeals erred in holding that property of the decedent received from the Harmon Trust was not

previously taxed and therefore deductible within the meaning of Section 812(c) of the Internal Revenue Code.

5. The valuation of the Harmon Trust having been determined in a previous estate, in a proceeding in the Tax Court, and a stipulation fixing the tax on the entire estate having been entered into after compromise, the Court of Appeals erred in holding that parol evidence to contradict or modify the terms of that stipulation was admissible.

ARGUMENT

Summary of Argument.

POINT A: The decision of the Court of Appeals for the Tenth Circuit in this case is in conflict with a decision of the Court of Appeals for the Fifth Circuit.

POINT B: The determination of the Court of Appeals that parol evidence, explaining the basis of a stipulation fixing the tax on a prior estate, was properly admissible in a proceeding in which it was sought to deduct the value of property received from the prior estate as property previously taxed is erroneous where the value of the prior estate had been determined in the prior tax proceeding and the Federal Estate Tax had been fixed and settled on the entire estate and is violative of public policy in the collection of revenues; and, in so applying the parol evidence rule, the decision of the Court of Appeals is in conflict with the decision of the Court of Appeals for the Eighth Circuit in *Maryland Casualty Co.* v. *United States,* 169 F. (2d) 102 (1948).

POINT A.

The decision of the Court of Appeals for the Tenth Circuit in this case is in conflict with a decision of the Court of Appeals for the Fifth Circuit.

In the instant case, the grantor had reserved the right to demand the resignation of the incumbent trustee and appoint a successor trustee upon the giving of thirty days notice. Up to the time of his death eight years later, the decedent did not exercise this right. Both the Tax Court and the Tenth Circuit held (in each case by a divided Court) that inasmuch as under the terms of the trust, the trustee was given power to terminate the trust, the grantor could appoint himself successor trustee and so terminate the trust. This, it was held, was sufficient to bring the corpus within the decedent's estate. Your petitioner claims for the reasons forcefully set out by the Chief Judge in his dissent in the Court of Appeals that the majority of the Court erred in so holding (R. 370-371). The Chief Judge in his dissent said:

> "Section 811(d)(3) does not apply to notice prerequisite to the removal of a trustee. By its term, it is expressly limited to the giving of notice that an alteration, amendment or revocation will be made, on notice that an alteration, amendment or revocation will become effective at the expiration of a stated period. It has no application to a notice of the future effective date of a resignation of a trustee. The resignation of a trustee and the appointment of a new trustee is not an alteration, amendment, or revocation of a trust".

However, even assuming the decedent had the power of termination set forth in the Children's Trust, the Court of Appeals for the Fifth Circuit has rendered a decision which is in conflict with the decision of the Tenth Circuit

in this case. This decision of the Court of Appeals for the Fifth Circuit was rendered in the case of *Hays' Estate* v. *Commissioner of Internal Revenue,* 181 F. (2d) 169, which was decided since the instant case was argued in the Tenth Circuit. In the *Hays* case, the decedent established a trust of realty in 1941 for the benefit of her children, and in the event of the death of any one of the beneficiaries, "the interest of such beneficiary was to pass to his or her heirs at law under the laws of descent and distribution of the State of Mississippi". There were also provisions: (1) that the "beneficiaries of this trust shall have no interest in the trust estate and the income therefrom, except to receive the income as herein provided" and (2) that the trustee might accumulate income. There was also a stringent spendthrift clause—the beneficiaries were without power to assign, pledge or encumber their interest and their interest could never become liable for their debts. The decedent in that case further reserved the right to terminate the trust at any time, but, in any event, it was to terminate upon her death. The Court of Appeals for the Fifth Circuit, reversing the Tax Court, held that the trust was not taxable stating that the estates granted were sufficiently vested in the beneficiaries so as not to permit their inclusion within the estate of the grantor.

There was the remote possibility that intervening death might have changed the succession in the instant case; however, any alleged limitation of the attributes of ownership resulting therefrom is countered by the fact that the *life beneficiaries had a general power of appointment exercisable by will* (R. 41).

Under this power each beneficiary could have appointed to his estate, to his creditors, to the creditors of his estate, to named beneficiaries or to a class, or to such persons as would take by inheritance if he died intestate, in other words to his heirs. The interest of a beneficiary subject to such a power of appointment would be required to be

included in his gross estate under Section 811(f) of the Internal Revenue Code.

To recapitulate, under the Children's Trust:

1. The beneficiaries had a vested interest.

2. There was no discretion with respect to accumulation of income; it was to be accumulated until each beneficiary reached majority, and thereafter to be paid periodically.

3. There were no spendthrift provisions or provisions against assignment of principal or income.

4. The trust could not be altered, amended, revoked or extended.

5. Each beneficiary had an unlimited power of appointment by will; and

6. The decedent had no reversionary interest, or possibility of reversion, whatever.

It is apparent, therefore, that each beneficiary of the Children's Trust had a greater present interest than was the case in the *Hays* case, *supra,* having, in effect, an estate of inheritance, plus an indefeasible right to income upon attaining majority and to principal upon becoming of stated age. It is apparent, also, that this decedent could not defeat these present interests, as could be done at least with respect to income in the *Hays* case.

Moreover, the power to terminate was qualified and the discretion of the trustee was required to be exercised in accordance with the best interests of the beneficiaries (R. 367). As was said by the Court of Appeals in the *Hays* case, *supra,*

> "The trustee was bound to act in conformity with the purposes of the trust. Her discretion was subject to control by a court of equity. It was said

> in *Stix* v. *Commissioner,* 2 Cir., 152 F. 2d 562, at page 463, that 'no language, however strong, will entirely remove any power held in trust from the reach of a court of equity'; but we do not need to go that far here, since the trustee's discretion was governed by determinable standards, and was never abused or even exercised".

The decisions of the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Tenth Circuit being in conflict as to whether, under such circumstances, a bare power of termination is sufficient to bring a trust corpus within a decedent's gross estate, under Section 811(d)(2) of the Internal Revenue Code, the Supreme Court should resolve this conflict. It is respectfully submitted that the decision of the Fifth Circuit is correct, and that this decedent did not have the power to alter, amend, or revoke the Children's Trust within the meaning of Section 811(d) of the Internal Revenue Code.

POINT B.

The determination of the Court of Appeals that parol evidence, explaining the basis of a stipulation fixing the tax on a prior estate, was properly admissible in a proceeding in which it was sought to deduct the value of property received from the prior estate as property previously taxed is erroneous where the value of the prior estate had been determined in the prior tax proceeding and the Federal Estate Tax had been fixed and settled on the entire estate and is violative of public policy in the collection of revenues and in conflict with a decision of the Court of Appeals for the Eighth Circuit.

In seeking to deduct the value of property received from a so-called "Harmon Trust" as property previously taxed within Section 812(c) of the Internal Revenue

Code, your petitioner presented in the Tax Court, a stipulation fixing the tax on the entire Harmon Estate, and also presented a consent judgment based thereon (R. 257). Since the value placed upon the Harmon estate included the amount passing to the trust (R. 244), it was contended that it was incontrovertible that the portion of the trust property passing to the petitioner decedent had been previously taxed. This is so because an estate is an entity for Federal Estate Tax purposes; and it is not possible to separate an estate into component parts to determine, for purposes of Section 812(c), whether such component part has been subject of tax (R. 374-375). The Commissioner, however, sought to introduce testimony covering certain conferences held prior to the time the stipulation was entered and to the effect that it had been agreed that the portion passing to petitioner decedent should not be included in the Harmon estate. The Tax Court ruled that such testimony served to vary or contradict the written stipulation, and thus was violative of the parol evidence rule (R. 73). The Court of Appeals reversing this, held, in effect, that the fact in issue was not the instrument itself, but whether or not the valuation contained therein had been correctly established (R. 364-5), and that such testimony did not disturb the written instrument inasmuch as the real fact in issue, to which the testimony was directed, was independent of the instrument itself. It is submitted, that the validity of the instrument and the valuation determined thereby which forms the basis of your petitioner's entire claim is the real fact in issue.

It is axiomatic that written agreements, unambiguous in their language cannot be varied, enlarged or modified by parol or extrinsic evidence. This rule is as equally applicable to the consent judgment entered on the basis of the stipulation (R. 257) as it is to the more usual type of

written contract. See *Freeman on Judgments,* Sec. 1350 (5th Edition):

> "A consent judgment is undoubtedly contractual in its nature and should be construed as though it were a contract * * * but notwithstanding statements frequently made to the contrary, the judgment is obviously something more than a contract, being rather the result of a contract and its embodiment in a form which places it and the matters covered by it beyond further controversy. * * * it is equally conclusive as to the matters adjudicated, is not subject to collateral attack except upon jurisdictional grounds and is entitled to full faith and credit in a sister state".

An attack upon a judgment is regarded as collateral if made when the judgment is offered as the basis of the opponents claim, 31 *American Jurisprudence,* Section 610.

Your petitioner is here offering a stipulation entered into in the *Harmon* proceeding as the basis of her claim. That claim is that the *Harmon* estate had been valued as a unit, including the property transferred to the *Harmon* trust, and that a tax was paid thereon. The notice of deficiency (Exhibit I to the Petition in the *Harmon* case, R. 244-252) which is an integral part of the pleadings (Rule 7, (1), Tax Court Rules of Procedure) established the value of the *Harmon* estate and included therein transfers amounting to $403,883.98 (R. 244), to a trust which it identified as the *Harmon* Trust (R. 251-252). The stipulation entered into, in which the Commissioner was asserting a deficiency against the *entire Harmon* estate based on this valuation, reads: "It is hereby stipulated and agreed: (a) that the Federal Estate Tax liability *in this proceeding* is as shown in the following statement: Net Tax Liability—$13,773.44" (R. 256). In the *Harmon* proceeding, the bounds of the estate unit had been described by the Com-

missioner in his notice of deficiency and it included the interest of your petitioner's decedent in the trust. The Commissioner set a tax on that unit in accordance with the terms of the stipulation entered into.

Whether the Harmon Trust had been valued and a tax set thereon is the heart of the matter. The stipulation read in the light of the pleading states that it had. The introduction of oral testimony constituted an attempt by the Commissioner to attack collaterally the consent judgment, based upon a stipulation which forms the entire basis of your petitioner's claim. It is respectfully submitted, that the introduction into evidence of oral evidence to vary or contradict this stipulation embodied in the consent decree was violative of the parol evidence rule and does violence to our public policy in the collection of revenue.

The case of *Popplewell* v. *Stevenson,* 176 F. (2d) 362, cited by the Court of Appeals in support of its decision in this case is inapplicable. There, the fact in issue, and the correct determination thereof (the number of rooms in a hotel), was independent of the instrument. In the instant case, the fact in issue is the instrument itself and what it determines as to the valuation of the Harmon Trust. The correctness of the valuation and the determination are immaterial. The statute fixes the credit "only in the amount *finally determined* as the value of such property in determining the value of * * * the gross estate of such prior decedent, * * *. 26 U. S. C. A. Sec. 812(c) (italics ours). The issue was whether the pleadings, and the valuation therein, were presented in valid instruments, and not whether the valuation established by the stipulation and consent decree was correct.

In any event, the determination of the Court of Appeals allowing the admission of parol evidence is in conflict with a decision of the Court of Appeals for the Eighth Circuit

in *Maryland Casualty Co.* v. *United States,* reported at 169 F. (2d) 102, wherein it was held that testimony of a party to a written contract that he intended to express a meaning contrary to that which the law imposes upon the contract is not admissible and where a contract, complete in itself, fails to embody a previous oral agreement, it must be presumed that the parties have purposefully rejected the earlier oral agreement. A conflict of decisions in the lower courts and in the foregoing Circuit Courts of Appeal with reference to applicability of the parol evidence rule exists. The applicability of this rule in a proceeding under Section 812(c) of the Internal Revenue Code presents a substantial and important question of public policy pertaining to the collection of revenue and it is submitted that the Supreme Court should render an authoritative decision clarifying the law and determining the finality of tax decrees in a previous proceeding within the meaning of Section 812(c) of the Internal Revenue Code.

It is therefore respectfully submitted that these cases call for the exercise by this Court of its supervisory powers by granting writs of certiorari and thereafter reviewing and reversing said decisions.

Dated, New York, N. Y., August 1st, 1950.

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statutes involved	2
Statement	2
Argument	7
Conclusion	14
Appendix	16

CITATIONS

Cases:

Appeal of Real Estate Title Co., 125 Pa. 549	14
Burget v. *Cranston*, 297 Fed. 32	14
Case, J. L., Threshing Mach. Co. v. *Buick Motor Co.*, 39 F. 2d 305	14
Commissioner v. *Estate of Holmes*, 326 U. S. 480, rehearing denied, 327 U. S. 813	8, 9, 12
Hays' Estate v. *Commissioner*, 181 F. 2d 169	11
International T. S. Corp. v. *International T. S. Corp. of* Chicago, 56 F. 2d 969	14
Maryland Casualty Co. v. *United States*, 169 F. 2d 102	14
Popplewell v. *Stevenson*, 176 F. 2d 362	14

Statutes:

Internal Revenue Code:	
Sec. 811 (26 U.S.C. 1946 ed., Sec. 811)	8, 10, 12, 16
Sec. 312 (26 U.S.C. 1946 ed., Sec. 812)	12, 13, 17

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 238

ESTATE OF PAUL LOUGHRIDGE, DECEASED, MARJORIE MEAD LOUGHRIDGE, EXECUTRIX, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 74-96) are reported at 11 T. C. 968. The opinion of the Court of Appeals (R. 351-365) and the dissenting opinion (R. 365-376) are not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 11, 1950 (R. 377), and a petition for

rehearing was denied on June 7, 1950 (R. 385). The petition for writ of certiorari was filed on August 7, 1950. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTIONS PRESENTED

1. Whether the value of the corpus of a trust established by decedent for the benefit of his children was includible in decedent's gross estate under Section 811(d) of the Internal Revenue Code by virtue of the retention by the decedent of the power to appoint himself trustee and as such to terminate the trust.

2. Whether the Court of Appeals erred in holding admissible parol evidence offered by the Commissioner which was designed to demonstrate the basis of a compromise and stipulation for judgment in an earlier but related case involving a different taxpayer.

STATUTES INVOLVED

These will be found in the Appendix, *infra.*

STATEMENT

The material facts upon which this petition is predicated may be summarized as follows:

Paul Loughridge, the decedent, was born September 14, 1892. He and Marjorie Mead Loughridge were married on June 10, 1924, and at the time of his death, on February 26, 1943, he was survived by his wife and their four minor children. (R. 76.)

During a period of a year or more prior to July 15, 1929, various discussions were had between the

decedent, his wife, his brother, William H. Loughridge, a bachelor, and his mother, Amelia H. Loughridge (hereinafter referred to as Mel H. Loughridge), as to the matter of creating a trust for the benefit of decedent's children and the children of William in the event he should marry. In accordance with an understanding growing out of those discussions, on July 15, 1929, Mel H. Loughridge made a gift of numerous and various securities to her two sons, Paul, the decedent, and William, by a deed of gift. (R. 76.)

In her gift the donor requested that her two sons, with such part of the proceeds of the gift as they should then or thereafter determine, make provision, by way of trust or otherwise, for the support, maintenance and education of their children, that is to say, for the children her son Paul Loughridge then had and for any children that her son, William H. Loughridge might thereafter have in the event of his future marriage. (R. 77.)

On July 16, 1929, a declaration of trust (hereinafter referred to as the Children's Trust) was executed by the decedent as donor and by the decedent and his wife, Marjorie, as trustees for the benefit of their three children, Paul, Jr., Charles, and Ruth, and with power reserved to those original trustees to "at any time and from time to time, alter, amend or extend all or any of the terms and conditions of this trust." (R. 77.)

On December 27, 1935, Paul Loughridge, the decedent, and Marjorie Mead Loughridge acting un-

der their reserved powers to amend and modify the then existing Children's Trust and as the trustees thereof, together with the United States Trust Company of New York, executed a modifying trust instrument, under which Paul Loughridge and his wife resigned as trustees and transferred to such Trust Company, as trustee, all the trust property which was to be divided into four equal shares, with one share set apart in trust for each of decedent's four minor children; during the minority of each child the income from his share was to be accumulated and paid over to him upon attaining the age of 21 years, if living, and thereafter during the continuance of the trust he was to receive the current income from his share, if living; but if any child died before attaining 21, the accumulated income of his share was to be paid to those persons who would take the principal of his share; and if any child died after attaining 21 and before termination of the trust, the income of his share was to be paid to his surviving issue *per stirpes* and if there were none, then to the decedent's living children in equal shares, or their surviving issue. The trust for each child was to terminate when the younger of Charles and Ruth Loughridge then living attained the age of 40 years, or upon the death of the survivor of Charles and Ruth before attaining the age of 40; and upon such termination each child's share was to be transferred to him absolutely in fee simple, if living, but if dead, then as directed by his will or if he should fail to exercise his power of

appointment, then to his surviving spouse and/or issue in specified shares in fee simple and if there be no surviving spouse or issue then to Marjorie Mead Loughridge in fee simple or if she be dead, to her estate. (R. 78-79.)

Under the second paragraph of the trust the trustee was authorized and empowered in its absolute discretion to terminate the trust of such share as to the whole or such part or parts thereof by an instrument or instruments in writing, and thereupon it shall be the duty of the trustee to assign, transfer, pay over and deliver, absolutely and in fee simple and free and discharged of all trusts, the whole of such share of the trust fund or such part or parts thereof as the case may be, unto the beneficiary of such trust. (R. 79-80.)

Paragraph twelve of the trust provided that Paul Loughridge could upon a written thirty day notice compel the resignation of the trustee and further that he, or his wife if he were not then living, could appoint a successor trustee with all the powers granted to the trustee under the trust instrument. Nothing in the trust instrument prevented the appointment by Paul Loughridge of himself as trustee. (R. 80.)

The Tax Court held that Paul Loughridge had at his death such power to appoint, revoke, or amend the trust which he had established for his children so as to render the value of the trust corpus includible in his estate under Section 811(d). (R. 85-90.)

This determination was affirmed by the Court of Appeals with one dissent. (R. 351-376.)

In determining the deficiency in estate tax due from the estate of the decedent the Commissioner allowed a deduction for previously taxed property under Section 812(c) of the Internal Revenue Code, the theory being that a portion of the property, the value of which was normally includible in the estate of the decedent, had already been taxed once within a five year period in the estate of Fred H. Harmon, an uncle of decedent. Subsequently the Commissioner affirmatively alleged that he had allowed too large a deduction for previously taxed property. (R. 58-59.)

In support of the plea, the Commissioner introduced the testimony of a member of the technical staff of the Bureau of Internal Revenue. The witness testified that in advance of the date set for the trial of the proceeding in the Tax Court involving the liability of the Harmon estate for estate tax, representatives of the estate and representatives of the Commissioner met in conference for the purpose of considering a possible stipulation of facts or of settlement of all questions posed by the deficiency assessment; that he and the attorney representing the Commissioner agreed that the decedent's share in the trust property was not includible in the taxable gross estate of Harmon; that it should be eliminated from further consideration or discussion in that connection; that he and the attorney representing the Commissioner assumed a differ-

ent position respecting another share of the trust property; that they insisted upon its inclusion in fixing the value of the Harmon gross estate; that the remainder of the discussion related solely to this other interest in the trust property and did not concern itself with the share of the property belonging to the decedent; that at the conclusion of the conference one of the attorneys representing the Harmon estate stated that a proposal of compromise might be made prior to the trial of the issue relating to that interest in the property which was in dispute; that later an offer was made to pay one-half of the amount actually in dispute on the basis of including the value of that interest in determining the value of the Harmon gross estate; and that it was on the basis of that offer that the stipulation was signed and filed in the proceeding involving the liability of the Harmon estate for estate tax. (R. 92-94, 171-215, 363-364.)

The Tax Court admitted the testimony but later sustained an objection to it on the ground that it constituted an attempt to alter or vary by parol the terms of the stipulation and also amounted to an effort to attack collaterally the decision entered in the proceeding. (R. 73.)

The Court of Appeals, with one dissent, reversed the determination of the Tax Court in this respect. (R. 363-364, 377.)

ARGUMENT

1. The Court of Appeals properly affirmed the Tax Court's determination that the trust estab-

lished by the decedent for the benefit of his children was includible in decedent's estate under Section 811(d) of the Internal Revenue Code (Appendix, *infra*) by virtue of the retention by the decedent of the power to terminate the trust, and thus to terminate the conditions upon which each child's right of enjoyment was dependent. The lower court's decision moreover involves no conflict with any other decision, and presents no issue requiring a determination by this Court, the holding below being in complete accord with this Court's decision in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, rehearing denied, 327 U. S. 813.

Section 811(d)(2) upon which the determination of deficiency was predicated provides for the inclusion in the decedent's estate of the value at the time of his death of property transferred by decedent in trust prior to June 22, 1936, "where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, * * *." Since the donor reserved the power at any time to become trustee and under the express powers granted the trustee could terminate the trust in whole or part (R. 44-45, 49, 79-80), the statute required the inclusion of the trust in the decedent's estate; for if the decedent, as trustee, determined that the trust should be continued in effect, it could not be certainly determined that the children named as bene-

ficiaries would ever come into present ownership and enjoyment of their respective interests, whereas the termination of the trust would have immediately resolved the contingency and would have vested in the named beneficiaries absolute ownership and present enjoyment. As this Court stated in *Commissioner* v. *Estate of Holmes, supra* (p. 487):

> It seems obvious that one who has the power to terminate contingencies upon which the right of enjoyment is staked, so as to make certain that a beneficiary will have it who may never come into it if the power is not exercised, has power which affects not only the time of enjoyment but also the person or persons who may enjoy the donation. * * * A donor who keeps so strong a hold over the actual and immediate enjoyment of what he puts beyond his own power to retake has not divested himself of that degree of control which § 811 (d) (2) requires in order to avoid the tax.

Nor can the present case be distinguished from the *Holmes* case by virtue of the fact that the decedent was not trustee at the time of his death. He did at the time of his death have power to require the resignation of the trustee, by delivery of written notice,[1] to name himself as successor trustee and then immediately to alter the trust by terminating

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[1] Paragraph twelve of the trust instrument provided that Paul Loughridge could compel the resignation of the trustee by delivery of a written notice, the resignation to be effective not sooner than thirty days subsequent to the notice. (R. 80.)

it. (R. 79-80.) In this respect Section 811(d)(3) (Appendix, *infra*) provides in part as follows:

> For the purposes of this subsection the power to alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice * * *

There is no merit in the contention of the petitioner that Section 811(d)(3) is inapplicable here since it was not the exercise of the power to amend but rather the exercise of the right to become trustee which was subject to the prior notice. The assumption of the office of trustee would have been the first step and an integral part of the exercise of the power to amend had such been the intention of the decedent. Entirely apart, however, from the language of Section 811(d)(3), it is clear that under the language of the preceding subsection the decedent had such power as to require the inclusion of the trust corpus in the decedent's estate; for while it would have been necessary for the decedent to take an additional step in order to terminate the trust, the unfettered power to so act lay entirely within him. In rejecting the asserted distinction between the present case and the *Holmes* case the Tax Court and the Court of Appeals gave effect to the rationale of this Court's decision in the *Holmes* case, *supra,* and to the over-riding purpose of Section 811(d)(2) and (3) which was to preclude the avoidance of estate tax liability by legal technicalities and inventive draftsmanship.

2. The asserted conflict between the present case and the recent decision of the Court of Appeals for the Fifth Circuit in *Hays' Estate* v. *Commissioner,* 181 F. 2d 169, is nonexistent. In the *Hays* case the Court of Appeals recognized the correctness of the principle followed by the Court of Appeals here, namely, that the retention by the donor of the power to terminate a trust and thus to insure the present enjoyment by the named beneficiaries of shares of the trust corpus which otherwise they might never obtain, requires the inclusion of the corpus in the estate of the donor. In the *Hays* case, however, the Court of Appeals determined that under the language of conveyance and under the local law of Mississippi the named beneficiaries had acquired absolute fee simple interests which could not be divested by the settlor and which would pass to the heirs of the named beneficiaries, if at all, not by purchase but by inheritance. There is no basis whatever for a conclusion in this case that the decedent's children were granted an equitable estate in fee.[2] Moreover, the *Hays* decision is contrary

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[2] The trust instrument in the *Hays* case differs materially from that here. In the *Hays* case the trust provided that upon termination either by death of the decedent-grantor or by the trustee, the trust estate was distributable in kind to the decedent's four children in equal shares, but if one of the children had died before termination, his interest passed to his heirs at law under Mississippi law. In contrast, in the present case the trust instrument provided that if the child was not living, his share was to go to his appointees by will, and if the power of appointment was not exercised, then to the child's surviving spouse and issue, and if none, then to decedent's wife in fee simple.

to this Court's decision in *Commissioner* v. *Estate of Holmes,* 326 U. S. 480, rehearing denied, 327 U. S. 813, where it was pointed out (p. 486) that the term "enjoyment" in Section 811(d) connotes a present economic benefit rather than a technical vesting of a fee simple equitable interest.

3. The Court of Appeals correctly determined that parol evidence offered by the Commissioner in order to explain the basis of an earlier but relevant compromise and stipulation for judgment in another case was admissible; and no question of any significance is presented in this respect.

Section 812(c) (Appendix, *infra*), the purpose of which is to avoid payment of an estate tax on property more than once in any five year period, authorizes a deduction from the gross value of the estate of the decedent of any property forming a part of the gross estate of a person who died within five years prior to the death of the decedent where—

> an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of * * * the estate of such prior decedent * * * and only in the amount finally determined as the value of such property in determining the value of * * * the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate * * *.

The Commissioner had affirmatively pleaded that in determining the deficiency in the estate tax due by the estate of the decedent he allowed too great an amount as a deduction for previously taxed property. In order to sustain the burden of proof imposed upon him as a result of the affirmative plea, the Commissioner offered the unimpeached testimony of a member of the technical staff of the Bureau of Internal Revenue who testified that in the earlier proceeding it was conceded by all that no part of the property which eventually became part of the estate of the decedent was properly subject to tax; and that the ultimate settlement and the stipulation for judgment reflected the imposition of no tax in respect of the property involved here. (R. 171-215, 363-364.)

That the Court of Appeals was correct in upsetting the Tax Court's exclusion of the above testimony is patent; for the testimony fell within at least two exceptions to the so-called parol evidence rule. Contrary to the assertion of the petitioner, the evidence was not offered in order to vary or contradict the stipulation. The stipulation showed nothing except the amount of net estate tax liability to which the parties agreed; it was never intended to demonstrate the basis of the compromise, and it did not show whether or not the value of the property in question was included in the gross estate as Section 812(c) requires to qualify it as previously taxed property. The rule

of exclusion upon which petitioner relies does not preclude the reception of parol evidence which does not tend to vary or contradict the written instrument but rather is designed to show matters as to which the instrument is silent. In the second place, the parol evidence rule is applicable only in an action where the enforcement of an obligation which is created by the writing itself is the basis of the action. Here the parties to the stipulation are not the parties involved in the instant proceeding and the Commissioner is not seeking to enforce an obligation arising out of the stipulation or against a party to the stipulation. See *International T. S. Corp.* v. *International T. S. Corp. of Chicago,* 56 F. 2d 969 (C. A. 7th); *J. I. Case Threshing Mach. Co.* v. *Buick Motor Co.,* 39 F. 2d 305 (C. A. 8th); *Burget* v. *Cranston,* 297 Fed. 32 (C. A. 6th); *Appeal of Real Estate Title Co.,* 125 Pa. 549; *Popplewell* v. *Stevenson,* 176 F. 2d 362 (C. A. 10th).

The decision of the Court of Appeals does not conflict with *Maryland Casualty Co.* v. *United States,* 169 F. 2d 102 (C. A. 8th), as petitioner asserts (Br. 17-18). Unlike this case, that case involved (pp. 110-111) an effort to vary by parol evidence the terms of a written contract under circumstances differing materially from those here.

CONCLUSION

The decision of the Court of Appeals is correct and involves no conflict with any other decision.

For these reasons and since the petition raises no question of substantial importance, the petition should be denied.

Respectfully submitted,

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SEPTEMBER, 1950.

APPENDIX

Internal Revenue Code:

SEC. 811. GROSS ESTATE.

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—

* * * * *

(d) *Revocable Transfers.*—

* * * * *

(2) *Transfers on or prior to June 22, 1936.*—To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he has made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) *Date of existence of power.*—For the purposes of this subsection the power to

alter, amend, or revoke shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

* * * * *

(26 U.S.C. 1946 ed., Sec. 811.)

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * * *

(c) [as amended by Sec. 407 of the Revenue Act of 1942, c. 619, 56 Stat. 798] *Property Previously Taxed.*—An amount equal to the value of any property (1) forming a part of the gross estate situated in the United States

of any person who died within five years prior to the death of the decedent, or (2) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from the donor by gift, or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. Property includible in the gross estate of the prior decedent under section 811(f) and property included in total gifts of the donor under section 1000(c) received by the decedent described in this subsection shall, for the purposes of this subsection, be considered a bequest of such prior decedent or gift of such donor. This deduction shall be allowed only where a gift tax imposed under Chapter 4, or under Title III of the Revenue Act of 1932, 47 Stat. 245, or an estate tax imposed under this chapter or any prior Act of Congress, was finally determined and paid by or on behalf of such donor, or the estate of such prior decedent, as the case may be, and only in the amount finally determined as the value of such property in determining the value of the gift, or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate, and only if in determining the value of the net estate of the prior decedent no deduction was allowable under this subsection, section 861 (a)(2), or the corresponding pro-

visions of any prior Act of Congress, in respect of the property or property given in exchange therefor.

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(26 U.S.C. 1946 ed., Sec. 812.)

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